No. 3898

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED
(a corporation),
Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J. SWEENEY, copartners doing business under the firm name of LARZELERE, SWEENEY COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This writ of error is prosecuted to review the judgment of the District Court granting the defendants' motion for a non-suit.

The action is brought by George Wills & Sons, Limited, the plaintiff in error, against the defendants in error for damages for the breach of a written contract between the parties for the purchase and sale of 75 tons of Australian onions. The complaint was amended. The re-engrossed amended complaint is printed in the Transcript at pages 29, *et*

seq. The contract, which is set forth in full in the complaint, is as follows:

"San Francisco, California, U. S. A.
Feb. 19, 1917.

Larzelere, Sweeney Co.,
San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of 75 (Seventy-five) tons of 2240 lbs. Crated Brown Australian Onions at the price of 4 (four) cents U. S. currency per pound, landed on the dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of the Onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This Contract is of course subject to the usual clause exempting us from claims of any nature, through nonfulfillment caused by conditions, over which we have no control.

Yours faithfully,
For George Wills & Sons, Ltd.
A. H. Anderson,
Manager.

Accepted:
Larzelere Sweeney Co."

(Amended Complaint Re-engrossed, Tr. pg. 30.)

With reference to the performance of the contract by George Wills & Sons, Limited, the complaint contains the following allegations:

That on the 26th day of February, 1916, plaintiff's agents in Australia booked and reserved space for the shipment, on the steamer "Wattotara" of the Union Steamship Company of New

Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer "Wattotara," for shipment by said steamer to San Francisco. That when said space was reserved and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco. That through no fault of plaintiff said steamer did not proceed direct from Melbourne to San Francisco, but proceeded to San Francisco by way of Vancouver, British Columbia; that plaintiff had no control over the sailing time of said steamer, nor did plaintiff have any control over the route which said steamer should take in sailing from Melbourne to San Francisco; that the time of the departure of said steamer from Melbourne and the route taken by said steamer were determined and fixed by the said owners of said steamer. That the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

"2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots."

That the bills of lading issued by all steamship owners operating steamers between Australian

> ports and ports in the United States of America contain provisions substantially similar to the said provision hereinabove set forth. That neither plaintiff not its agents had knowledge, prior to March 14, 1917, that said steamer "Wattotara" would proceed to San Francisco by way of Vancouver; that at all times prior to said 14th day of March, 1917, plaintiff and its agents believed that said steamer would sail direct from Melbourne to San Francisco. That no steamer other than said "Wattotara" sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917. That at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition. That said onions were loaded on board said steamer before the 10th of March, 1917.

(Paragraph V of Re-engrossed Amended Complaint, Tr. pg. 31-33.)

The answer of the defendants denied the foregoing allegations, the denial being based on lack of information or belief. (Tr. pg. 18.)

The complaint further alleged that on May 19, 1917, the onions arrived at San Francisco; that plaintiff thereupon notified the defendant of their arrival and caused them to be landed on the dock, and the duty thereon to be paid. (Tr. pg. 33.) This allegation is not denied by the defendant's answer.

The complaint further alleged that the defendants failed and refused to accept the onions or to

pay the purchase price thereof to the plaintiff's damage in the sum of $4,572.43. (Tr. pgs. 34-36.) The allegation as to the plaintiff's damage is denied.

The action was tried by the court sitting without a jury. At the conclusion of the plaintiff's case the defendants moved for a nonsuit, which motion was granted by the court. Judgment in favor of the defendants was thereupon entered.

Specification of Errors.

The plaintiff in error relies upon and intends to urge the following error which it asserts was committed by the District Court, viz:

1. The court erred in granting defendant's motion for a non-suit.

Brief of the Argument.

On this writ of error the plaintiff in error maintains that the judgment of the District Court should be reversed for the following reasons, viz:

The court erred in granting defendants' motion for a nonsuit.

The defendants' motion for a nonsuit was made on the following alleged grounds:

1. That the evidence showed the onions were not put on board before March 10th.

2. That the vessel in which the onions were shipped did not leave Australia until March 16th, and that the departure at such time was not an effective shipment such as is called for by the contract.

3. That the vessel did not sail from Melbourne to San Francisco by a direct route, but via Sydney, Wellington and Vancouver. (Tr. pgs. 70-71.)

In granting the motion for a nonsuit the learned judge of the District Court said:

"The Court. I am very much inclined to the view, under the arguments which have been had, Mr. Harwood that you have not shown an effective shipment of these goods in accordance with the contract, that is, having the nature of the goods in view and the stipulations in the contract. I do not know what other meaning to give to the words 'to be effected' in connection with the words used there than to be accomplished. You have a stipulation there that the shipment should be effected from Australia. I am always reluctant to grant nonsuits. I always like to see what there is in the merits. When you are dealing with a written contract, however, you have to bring yourself within its terms if those terms inhere in its essential requisites. This certainly does. I think that it would be better—I am inclined to think that unless you had some evidence which would tend to exculpate you in rebuttal from the situation which you are now in, that even if I were to deny the motion now the defendants would have a right, and in order to avail themselves of the question involved they would be called upon to renew the motion upon the completion of the evidence. I am satisfied that standing on the evidence as it is now, I would be called upon to sustain the motion. I might as well

> do it now, and if this case is reviewed and the Circuit Court of Appeals should take a different view, then the evidence, being substantially all in the depositions and in the stipulations, would still be before us, there would be no loss in that regard." (Tr. pgs. 71-72.)

It will be seen that the court granted the nonsuit on the second ground stated in the defendants' motion, viz., the alleged ground that the departure of the vessel on March 16th was not "an effective shipment as called for by the contract."

The contract (see page 2, *supra*) contained the following provision:

> "shipment to be effected from Australia by steamer on the 10th of March, 1917."

The contention of the defendants which was sustained by the court was that this clause of the contract required that the steamer depart from Australia not later than March 10th.

It is respectfully submitted that in so holding the learned Judge of the District Court erred, for it has been uniformly held by the courts that a contract calling for a shipment on a certain day is complied with when the goods are delivered to the carrier on that day for shipment.

The evidence in the case at bar shows that the onions were delivered to the steamer before March 10th.

Francis Archibald Drake of Australia, whose deposition was read at the trial, testified that the space

for this shipment of onions was booked on the steamer "Waitotara" on February 26, 1917, and that when the space was booked the steamer was scheduled to sail to San Francisco. (Tr. pg. 42.) Mr. Drake further testified that when the space for the onions was booked the steamer "Waitotara" was scheduled to said from Melbourne for San Francisco on March 10th. (Tr. pg. 45.)

Mark Francis Shea, whose deposition was read at the trial, testified that his firm superintended the shipment of the onions at Melbourne, and that he commenced to deliver them to the steamer late in February, and that the delivery to the steamer was completed on March 7, 1917. (Tr. pg. 60.)

It will be seen, therefore, it was shown in evidence that the space for the shipment of onions was reserved on February 26th, and that the delivery of the onions to the steamer was completed on March 7th. The contract called for shipment on March 10th.

Goods are shipped when they are delivered to the carrier for transportation. See:

Ledon v. Havemeyer, 121 N. Y. 179; 8 L. R. A. 245, 24 N. E. 297;

Clark v. Lindsey, 47 Pac. 102 (Mont.);

State v. Carson, 126 N. W. 698 (Ia.) 140 Am. St. Rep. 330;

Schwann v. Clark, 27 N. Y. S. 262;

Bouvier's Law Dictionary, word "shipment";

Hutchinson on Carriers, Sec. 113 (Vol. 1); *Bower v. Shand,* L. R. 2 App. Cas. 455, 473.

In *Clark v. Lindsey,* 47 Pac. 102 (Mont.), *supra,* Judge Hunt, now judge of this court, said:

> "When plaintiff's assignor agreed to ship the goods on or before February 15th, presumably he meant only to deliver the goods on that date to the carrier for transportation on a regular line of transportation between the point of shipment and destination. This was done."

The word "shipment" is defined by *Bouvier* as follows:

> "The delivery of the goods within the time required on some vessel destined to the particular place which the seller has reason to suppose will sail within a reasonable time. *It does not mean a clearance of the vessel,* as well as putting the goods on board where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management."

Ledon v. Havemeyer, 121 N. Y. 179, *supra,* and *Bower v. Shand,* L. R. 2 App. Cas. 455, *supra,* are cited by *Bouvier* in support of the foregoing definition.

Ledon v. Havemeyer, 121 N. Y. 179, *supra,* was (like the case at bar) an action by the vendors to recover the damages which they had sustained by reason of the refusal of the buyers to accept and pay for certain personal property. The commodity in the *Ledon* case was sugar and the contract provided for "shipment within 30 days by steamer

or sail." The sugar was to be shipped from Cuba to New York. The contract was made on February 7th and on March 7th the sugar was delivered on board a vessel at a Cuban port for transportation to New York. The steamer did not sail from Cuba until March 13th. The defendants contended that the vendors had not performed their contract.

The court said:

> "The meaning (of the contract), we think, is the putting the goods sold on board a vessel bound for New York with the intent in good faith, to have them cleared for the point of destination in the regular course of trade, *or in a reasonable time after the shipment.*"

The court further said;

> "There is nothing in the language used in the contract, or in the surrounding circumstances, to intimate *that the vendors were expected to exercise any control over the clearance of the vessel, or her subsequent management.* That event might be governed by the condition of the tide, the direction of the wind, the facilities for clearance, and many other circumstances over which the vendors had no control, and could not have been supposed to have had when the contract was made. These were matters for the judgment of those navigating the vessel."

The court further said:

> "The vendors were bound to ship on some vessel, destined for the port of New York, *which they had reason to suppose would sail within a reasonable time after shipment was made.* * * * *If the vendors, in good faith,*

> *shipped goods upon such a vessel having reason to suppose she would sail within a reasonable time after shipment, we think it would be all the vendees could require, under the contract; and, if they desired a more speedy performance, it should have been specially provided for by agreement. There is no language in the contract requiring the clearance of the vessel or the arrival of the goods at any particular time.''*

The court further said:

> "The words 'shipment' and 'shipped' are now used indifferently *to express the idea of goods delivered to carriers for the purpose of being transported from one place to another.''*

In *State v. Carson,* 126 N. W. 698 (Ia.), 140 Am. St. Rep. 330, *supra,* the defendant was convicted under a section of the Iowa Code which made it a penal offense to "ship * * * any game birds out of the state." After the defendant had delivered the game birds to an express company they were taken by officers of the law. The defendant contended that he had not shipped the birds. In overruling this contention the court said:

> "We are of opinion that the delivery to the carrier for transportation to a point beyond the border of the State constitutes a violation of the statute. *The word, 'ship' as therein used* must be given its usual and ordinary meaning, if there is nothing in the law itself which indicates a different legislative intent. The words 'ship' and 'shipment' are now generally used to express the idea of goods delivered to carriers for the purpose of being transported

from one place to another, and such signification is given to them by lexicographers generally."

The facts with reference to the shipment of these onions were all set out in the plaintiff's amended complaint and on the defendants' demurrer thereto the foregoing authorities were cited. The court ruled that the complaint stated a cause of action. But at the trial of the case the learned District Judge held that the words "to be effected" in the sentence "shipment to be effected from Australia by steamer on the 10th of March, 1917," meant that the steamer must depart from Australia on that date.

It is respectfully submitted that the words "to be effected" cannot be given the meaning attributed to them by the District Court. The word "effected" is synonymous with the word "made" and the contract means the same as if it had read "shipment to be made from Australia by steamer on the 10th of March, 1917."

The word "shipment" has a well defined legal meaning. The use of the word "effected" in conjunction therewith cannot possibly change the meaning of the word "shipment." The *shipment* was *effected* when the onions were delivered to the steamer. If the parties had intended that the goods should be shipped on a steamer which should *depart* from Australia on March 10th they would have so specified in their written contract.

The learned judge said that the words "shipment to be effected" meant "to be accomplished." Un-

doubtedly this is so for "effected" means "accomplished." But it is respectfully submitted the *shipment* was *accomplished* when the goods were delivered to the carrier for transportation or when they were placed on board the steamer.

Reply to contention that evidence shows onions were not put on board before March 10th.

One of the grounds of the motion for nonsuit was "that it affirmatively appeared from the plaintiff's evidence that the goods were not put on board the vessel before the 10th of March."

As stated above, the court, in granting the nonsuit, did not do so on this alleged ground.

But counsel for defendants was in error in contending that the evidence failed to show that the onions were put on board the vessel before March 10th.

Mr. Shea testified as follows:

> "Interrogatory No. 3. When did you commence to deliver these onions to the steamer?
> Ans. Late in February, 1917.
> Interrogatory No. 4. When was the delivery completed?
> Ans. On March 7th, 1917." (Tr. pg. 60.)

Mr. Drake testified as follows:

> "Interrogatory No. 3. From whom did you receive this bill of lading?
> Ans. Messrs. Shea Hood & Co. of Melbourne who received the Bill of Lading from the Union Co. after putting the Onions aboard as our Shippers." (Tr. pg. 42.)

When the witness Shea stated that the onions were delivered to the steamer he necessarily meant *a complete delivery on board the steamer.* The meaning of the expression "delivered to the steamer" is carefully considered by the highest court of New York State in the case of *Baldwin v. Sullivan Timber Co.,* 142 N. Y. 290, 36 N. E. 1060-1061, where the Court of Appeals said:

> "There is a further provision that the cargo is 'to be delivered alongside at merchant's risk and expense, and to be received by the master, and secured with the ship's dogs and chains when so delivered, and to be then at ship's risk.' This clause was needless if a mere delivery alongside was a *complete delivery to the vessel, for, after such complete delivery, the liability of the ship would of course attach.* The need of the provision lay in the fact that delivery alongside was not a complete delivery, because the merchant was still to remain in possession and control of his lumber for the purpose of loading and stowing it, and before that was accomplished the ship would assume no risk unless by force of a particular and specific provision, which, therefore, was added, and which put upon the vessel simply the duty of holding the timber safely alongside, *to enable the shipper to complete his delivery by loading and stowing.* And so when the parties agreed in the terms of their contract that, if the cargo should 'not be delivered to vessel at Pensacola' within the specified time, demurrage at a specified rate should be allowed, *the delivery referred to is the complete and final delivery, not merely alongside, but to the vessel, which did not occur until the lumber was loaded and stowed,*

> *and so passed out of the custody and control of the merchant, and into that of the ship.* Wherever a delivery 'alongside' alone is meant, that qualifying word is used, and its omission when 'delivery to the vessel at Pensacola' is prescribed in the clause relating to demurrage indicates that *a complete delivery to the ship,* ending the duty and control of the charterer, was what was meant."

It will be noted that *this very language is used in the contract,* where it is provided that "Quality of the onions *delivered to the steamer* in Australia to be guaranteed and a certificate for same will be provided". (See contract page 2, *supra.*)

Undoubtedly the parties meant by the expression "delivered to the steamer," the loading of the onions on the steamer.

The *Century Dictionary* defines "deliver" as follows:

> "To give or hand over; transfer; put into another's possession or power; commit; pass to another; as to deliver a letter."

So when goods are delivered to a person they are placed in his possession and likewise when goods are "delivered" to a steamer they are placed in the possession of the steamer, or on the steamer.

Webster's Dictionary defines "ship" as follows:

> "By extension, in commercial usage, to commit to any conveyance for transportation to a distance."

The witness Shea testified that the goods were delivered, that is, committed to the vessel.

> "The mere unloading of goods by a vessel does not of itself constitute delivery if the goods are still subject to the risks of transportation."

The St. Georg, 95 Fed. 172, 177.

> "Delivery from a vessel 'means unloading or discharging from the vessel'."

The Egypt, 25 Fed. 320.

Conversely "delivery to" means the loading *on* the vessel.

> "Delivery by a common carrier implies mutual acts of the carrier and the consignees, and, when a wharf was the place of delivery, a mere physical loading of the goods on the wharf was no delivery."

Ostrander v. Brown, 8 Am. Dec. 211 (N. M.)

So when the witness testified that the onions were completely delivered to the steamer he meant not only that they were loaded on the vessel but also that they were received by the vessel as a common carrier.

The word "deliver" has been judicially defined as follows:

1. To hand over.
2. To make delivery of.
3. To place in the power or possession of another.
4. To surrender possession of.
5. To yield possession of.

18 *C. J.* 476.

> "Delivery has been described as a composite act in which both parties must join."
>
> 18 *C. J.* 478.

One of the meanings of the word "deliver" is *to transfer* (*Century Dictionary.*) The expression "delivered to the steamer" can be rendered "transferred to the steamer."

"Delivery" is defined by the *Standard Dictionary* as

> "a transferance or passing over from one to another, as a delivery of stocks."

Furthermore the word *to* means *on* or *upon*. *To* is defined by the *Century Dictionary* as follows:

> "Upon; on; denoting contact, junction, or union."

There are three separate answers to the defendants' contention that the evidence does not show that the onions were loaded on the steamer by March 10th. These answers are:

1. That the testimony does affirmatively show that the onions were delivered on board the steamer.
2. That delivery on board was not essential, the shipment being effected when the goods were delivered to the carrier for loading.
3. Even if the meaning of the language used by the witness was doubtful, that is, even if his testimony left it uncertain as to whether the onions were actually on board on March 7th, on this motion for a nonsuit the doubt should be resolved in favor of the plaintiff. as on such motions every reasonable inference in favor of the plaintiff should be indulged in.

We have already seen that the testimony affirmatively shows that the onions were delivered on board the steamer on March 7th.

But delivery on board was not essential for a shipment is accomplished when the goods are delivered to the carrier for transportation. This is shown by the authorities cited in the first part of this brief.

In *Clark v. Lindsay,* 47 Pac. 102 (Mont.) Judge Hunt said:

> "When plaintiff's assignor agreed to ship the goods on or before February 15th, presumably he meant only to deliver the goods on that date to the carrier for transportation on a regular line of transportation between the point of shipment and destination. This was done."

And in *Ledon v. Havemeyer,* 121, N. Y. 179, *supra,* the court said:

> "The words 'shipment' and 'shipped' are now used indifferently *to express the idea of goods delivered to carriers for the purpose of being transported from one place to another.*"

The learned District Judge held during the trial that it was not necessary to show that the goods were put on board the steamer. In reply to the statement of counsel for plaintiff that "according to the authorities, when goods are delivered to the steamer they are delivered on board," Judge Van Fleet said:

> "I should think that would be true. A party is not permitted to put them on board." (Tr. pg. 62.)

In *Hutchinson on Carriers,* Sec. 113 (Vol. 1), the author says:

> "If delivery be made at the warehouse or other place of business of carrier for as early transportation as can be made in the course of the carrier's business, and subject only to such delays as may necessarily occur in awaiting the departure of trains, vessels * * * he becomes at once a carrier of the goods. * * * *It makes no difference whether the loading is to be performed by the shipper himself or the carrier.*"

The bill of lading introduced in evidence is dated March 12, 1917. At the trial it was contended by counsel for defendants that the date of the bill of lading was *prima facie* the date of shipment. Unquestionably that is the case, but in this case the evidence aside from the bill of lading shows that the shipment was completed on March 7th.

But even if the shipment had not been made until March 12th this slight and unimportant delay would not void the contract.

In *Norrington v. Wright,* 115 U. S. 188, 203, cited in *Mechem on Sales* (Sec. 1215) the facts were that contract called for shipment of "about 1,000 tons per month during each month, beginning February 1880." Only 400 tons were shipped in February, and 885 in March. The court held that this was not a compliance with contract and that the buyer was entitled to rescind. But with reference to undershipments in June the Supreme Court said:

> *"Slight and unimportant deficiences may be made up in July."*

So here, a "slight and unimportant" variation of a day or two was not vital. The Supreme Court in the above case held that a "statement descriptive of the subject matter, or some material incident such as the time or place of shipment is *ordinarily* to be regarded as a warranty." There was a warranty that 1000 tons would be shipped in June but nevertheless it was held that slight and unimportant deficiences might be made up in July.

Ordinarily the time of the voyage from Melbourne to San Francisco is about a month, so it is apparent that a variation of two days was unimportant. In fact a variation of two days in the sailing time between these ports is very frequent. The situation is very different from the situation presented in the case of *Redlands Orange Growers v. Gorman,* 76 Mo. App. 184, cited by defendants at the trial, where the contract called for the shipment of oranges from California to St. Louis. The contract called for shipment on December 21st and it was known that the oranges were required for the St. Louis holiday trade. In this case a delay of 2, 3 and 4 days was held material. The time consumed in transportation was only four days, the oranges moving by special fast freight.

In *Morel v. Stearns,* 75 N. Y. S. 108, 1082, the court said:

> "Delivery about noon on June 1st is sufficient compliance with contract to deliver goods in April and May."

In the case at bar it is apparent that a delay of two days in the shipment could in no way have injured the defendants.

In *Ingram v. Wackernagel,* 48 N. W. 998, a day's delay was held not material.

Even if the language of the witnesses had left it in doubt as to whether the onions were loaded on the vessel before March 10th that doubt, on a motion for a nonsuit should have been resolved in favor of the plaintiff.

Even if the testimony of the plaintiff's witnesses had left it in doubt as to whether the onions were delivered on board the steamer before March 10th, that doubt should have been resolved in favor of the plaintiff on a motion for a nonsuit.

In 38 *Cyc.* 1551 the author says:

> "It (a motion for a nonsuit) admits the truth of plaintiff's evidence and every inference of fact that can legitimately be drawn, and on such motion the evidence will be interpreted most strongly against defendant."

It is not necessary that the fact in issue is necessarily inferable from the testimony; it is sufficient if the fact in issue *may be* inferred therefrom. In *Ferris v. Baker,* 127 Cal. 523, the court said:

> "Perhaps none of these are necessary inferences from the facts proven, but, as the evidence tended to justify them, they are to be regarded for present purposes as facts established; as such they tend to show the relation of mining

partners between plaintiff and Mrs. Baker. It was error, therefore, to order a nonsuit."

In 38 *Cyc.* 1553 the author says:

"On motion for nonsuit, plaintiff is entitled to the most favorable construction of the evidence that can be given it. All the facts given in evidence to support the material allegations of the declaration or complaint are taken to be true, and plaintiff is entitled to the most favorable inferences deducible from the evidence."

In 38 *Cyc.* 1559 the author says that a motion for a nonsuit must be denied:

"Where upon any construction which the jury is authorized to put upon the evidence, or by any inference they are authorized to draw from it, plaintiff is entitled to recover."

In *Estate of Arnold,* 147 Cal. 586, the court said:

"Every favorbale inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly suspectible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded."

In *Warner v. Darrow,* 91 Cal. 309, 312, the court said:

"A motion for a nonsuit admits the truth of plaintiff's evidence and every inference of fact which can be properly drawn therefrom."

Even where evidence is improperly admitted over objection if it tends to prove the material fact in issue a motion for a nonsuit must be denied. In *Wright v. Roseberry,* 81 Cal. 91, the court said:

> "Even where evidence is erronously admitted against objection, but tends to prove something, full effect must be given to it upon motion for nonsuit."

On a motion for a nonsuit the evidence should be interpreted most strongly against the defendant. In *Goldstone v. Merchants' Etc. Co.,* 123 Cal. 631, the court said:

> "The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom (*Wright v. Roseberry,* 81 Cal. 87; *Warner v. Darrow,* 91 Cal. 309); and I think upon such motion the evidence should be interpreted most strongly against the defendant. I think also that the rules as to nonsuit are the same whether the trial is by the court or by a jury."

To the same effect is *Hanley v. California Etc. Co.,* 127 Cal. 236.

Reply to contention that nonsuit should be granted because of the indirect course which the vessel followed.

The third alleged ground of the motion for nonsuit was that the onions arrived at San Francisco 69 days after March 10th, and that the steamer touched at Sydney, Wellington and Vancouver before arriving at San Francisco.

But the evidence shows that when the space for the onions was reserved with the steamship company

on February 26th and when the shipment was made the "Waitotara" was scheduled to sail direct to San Francisco.

Mr. Drake testified as follows:

"Interrogatory No. 4. Q. Do you know when the space for this shipment of onions was booked or reserved with Union Steamship Company of New Zealand?

Ans. Yes.

Q. If the answer to the preceding interrogatory was "yes," please state when said space was booked.

Ans. February 26th, 1917.

Q. At the time this space was booked, for what voyage was the 'Waitotara' advertised or scheduled?

Ans. Our advice was that the 'Waitotara' was engaged to start for San Francisco." (Tr. pg. 42.)

"Interrogatory No. 10. Before the completion of the delivery of the onions to the steamer, had you been informed by Union Steamship Company of New Zealand, Ltd., or by anyone else, that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 11. Before the completion of the delivery of the onions to the steamer had any one connected with the firm of George Wills & Company, Limited, to your knowledge, been informed that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 12. When did you first learn that the 'Waitotara' would proceed to San Francisco via Vancouver?

Ans. Too late to divert owing to onions being already loaded. In fact the ship had sailed

before I knew of the diversion." (Tr. pgs. 43-44.)

Interrogatory No. 14. At or before the time of the delivery of the onions to the steamer, did you know that the "Waitotara' would proceed to San Francisco via Vancouver?

Ans. No.

Interrogatory No. 15. To your knowledge, at or before the time of the delivery of the onions to the steamer, did anyone connected with George Wills & Sons, Limited, know that the 'Waitotara' would proceed to San Francisco via Vancouver?

Ans. Not to my knowledge.

Interrogatory No. 16. When did you first learn that the 'Waitotara' would touch at Wellington and Sydney on its way to San Francisco?

Ans. Not until after the ship had sailed." (Tr. pgs. 44-45.)

On cross-examination Mr. Drake testified:

"Cross-Interrogatory No. 5. What ports, if any, were you informed that the 'Waitotara' would visit upon this voyage from Melbourne to San Francisco?

Ans. I was given to understand that it was a direct sailing to San Francisco.

Cross-Interrogatory No. 6. Did you make any inquiry of any of the officials of the Union Steamship Company, Ltd., before you commenced to deliver the onions covered by the bill of lading mentioned in Interrogatory No. 2 as to the time of departure or route to be followed by the 'Waitotara'?

Ans. Yes, I did make enquiry and was informed that the 'Waitotara' would sail on the 10th March from Melbourne to San Francisco as a direct steamer." (Tr. pgs. 47-48.)

The contract required the plaintiff to ship the onions on March 10th and the evidence shows that the plaintiff performed the contract. The delay of six days in the clearance of the vessel and the indirect course followed were matters beyond the control of the plaintiff. The contract did not call for delivery at San Francisco within any specified time. The evidence shows that when the space for the goods was reserved and when the goods were shipped the steamer was scheduled to sail direct from Melbourne to San Francisco.

Where the shipment is made at the time stipulated in the contract the vendee is bound to accept and pay for the goods although the arrival of the goods was delayed. See:

Peace River Phosphate Co. v. Grafflin, 58 Fed. 550;

43 *Century Dig.*, Title "Sales", Sec. 428;

Hardesty v. Pittsburgh Co., 89 S. W. 260;

Hawes v. Lawrence, 4 N. Y. 345.

In defining the word "shipment" *Bouvier* says:

> "The delivery of the goods within the time required on some vessel destined to the particular place which the seller has reason to suppose will sail within a reasonable time. It does not mean a clearance of the vessel, as well as putting the goods on board where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel *or of her subsequent management.*"

In their motion for a nonsuit counsel for defendant contended that the plaintiff's duty

> "was to choose a reasonable method of delivery, and that such method of delivery affirmatively appears from the plaintiff's evidence not to have been a reasonable method of carrying out their contract".

There can be no question as to the "reasonableness of the method of delivery" as the contract contains an express provision as to when the shipment should be made, and it was never intended (if this provision was complied with), that any subsequent delay on part of the carrier should avoid the contract.

The defendants received the very performance they contracted to receive, viz.: a shipment on March 10th from Melbourne to San Francisco. If the parties had intended that the goods should arrive at San Francisco within a specified time they would have so stipulated in their contract, and if it had been the intention of the parties that the goods should arrive at a certain time, or that the vessel on which they were shipped should not divert from a direct route, they would likewise have so stipulated.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, San Francisco,
February 10, 1923.

ALFRED J. HARWOOD,
Attorney for Plaintiff in Error.